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7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF CALIFORNIA**
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10 ALTARA MICHELLE,

11 Plaintiff,

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15 vs.
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20 ARCTIC ZERO, INC.,

21 Defendant.
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CASE NO. 12cv2063-GPC(NLS)

CASE NO. 12cv2284-GPC(NLS)

CASE NO. 12cv2279-GPC(NLS)

CASE NO. 12cv2544-GPC(NLS)

CASE No. 12cv2593-GPC(NLS)

CASE No. 12cv2647-GPC(NLS)

**ORDER GRANTING PLAINTIFF
MICHELLE'S MOTION TO
CONSOLIDATE CASE AND TO
APPOINT INTERIM CO-LEAD
CLASS COUNSEL AND DENYING
PLAINTIFFS GERTLER
FREEMAN KAPLAN AND
HILLER'S CROSS-MOTION TO
APPOINT INTERIM LEAD
COUNSEL AND APPROVE
LEADERSHIP STRUCTURE**

[Dkt. Nos. 21, 29.]

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26 Before the Court are Plaintiff Michelle's motion to consolidate and appoint interim co-lead
27 class counsel and Plaintiffs Gertler, Freeman, Kaplan and Hiller's cross-motion for appointment of
28 interim class counsel and approval of leadership structure. (Dkt. Nos. 21, 29.) The motions are

submitted on the papers without oral argument pursuant to Civil Local Rule 7.1(d)(1). After a review of the briefs, supporting documentation, and applicable law, the Court GRANTS Plaintiff Michelle's motion to consolidate cases and motion to appoint Duckor Spradling Metzger & Wynne and Paris Ackerman & Schmierer, LLP as interim co-lead class counsel; and DENIES Plaintiffs Gertler, Freeman, Kaplan and Hiller's cross-motion for appointment of interim class counsel and approval of leadership structure.

Procedural Background

On August 21, 2012, Plaintiff Altara Michelle filed a class action complaint against Defendant Arctic Zero, Inc. concerning deceptive and unfair advertising, promotion and sale of its line of Arctic Zero "low calorie" frozen desserts in case no. 12cv2063. On September 18, 2012, Plaintiff Brenda Freeman filed a similar class action complaint in case no. 12cv2279. On September 19, 2012, Plaintiff Lori-Ann Gertler filed a similar class action complaint in case no. 12cv2284. On October 19, 2012, Plaintiff Judy Kaplan filed a similar class action complaint in case no. 12cv2544. On October 24, 2012, Plaintiff Susane Hiller filed a similar class action complaint in case no. 12cv2593. On October 31, 2012, Plaintiff Zoya Kai filed a similar class action complaint in case no. 12cv2647.

On October 29, 2012, Plaintiff Michelle filed a motion to consolidate and a motion to appoint Duckor Spradling Metzger & Wynne, ALC ("DSMW") and Paris Ackerman & Schmierer, LLP ("PAS") as interim co-lead class counsel. (Dkt. No. 21.) On November 19, 2012, Plaintiffs Lori-Ann Gertler, Brenda Freeman, Judy Kaplan and Susane Hiller filed an opposition. (Dkt. No. 28.) They also cross moved to appoint Bursor & Fisher, P.A. ("B&F") as interim lead class counsel; Scott+Scott, LLP as Liaison Counsel; and the firms of Faruqi & Faruqi, LLP, Stephen Zouras LLP and Lexington Law Group as members of an executive committee.

Plaintiffs Gertler, Freeman, Kaplan and Hiller's agree that consolidation is appropriate. On November 19, 2012, Defendant filed a statement of non-opposition to motion to consolidate and appoint interim co-lead counsel. (Dkt. No. 30.) Defendant supports consolidation of all six cases as it will further judicial economy and conserve party resources. (*Id.*) Defendant also takes no position as to the Plaintiffs' request to appoint "interim class counsel." (*Id.*)

On December 3, 2012, Plaintiff Michelle filed a reply and opposition to Plaintiff Freeman,

1 Gertler, Kaplan and Hiller's cross-motion to appoint interim lead class counsel. (Dkt. No. 32.) On
 2 January 4, 2013, Plaintiffs Gertler, Freeman, Kaplan and Hiller filed a reply to their cross-motion for
 3 appointment of interim class counsel. (Dkt. No. 37.)

4 **Discussion**

5 **I. Motion for Appointment of Interim Lead Class Counsel**

6 Prior to class certification, the Court may designate an interim counsel on behalf of a putative
 7 class. Fed. R. Civ. P. 23(g)(3). "Instances in which interim class counsel is appointed are those in
 8 which overlapping, duplicative, or competing class suits are pending before a court, so that
 9 appointment of interim counsel is necessary to protect the interests of class members." White v.
 10 TransUnion, LLC, 239 F.R.D. 681, 683 (C.D. Cal. 2006) (citing Manual for Complex Litigation §
 11 21.11 (4th ed. 2004)). While Rule 23(g)(1) applies to class counsel and does not address interim class
 12 counsel, courts look to Rule 23(g)(1) factors to appoint interim class counsel. See Parkinson v.
 13 Hyundai Motor Am., No. CV06-345AHS(MLGX0, 2006 WL 2289801, at *2 (C.D. Cal. 2006); In re
 14 Air Cargo Shipping Servs., Antitrust Litig., 240 F.R.D. 56, 57 (E.D.N.Y. 2006).¹

15 In making this determination, the court considers: "(i) the work counsel has done in identifying
 16 or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other
 17 complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the
 18 applicable law; and (iv) the resources that counsel will commit to representing the class." Fed. R. Civ.
 19 P. 23(g)(1)(A). In addition, the Court "may consider any other matter pertinent to counsel's ability to
 20 fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B).

21 If a number of lawyers compete for class counsel appointment, "designation of interim counsel
 22 clarifies responsibility for protecting the interests of the class during precertification activities, such
 23 as making and responding to motions, conducting any necessary discovery, moving for class
 24

25 ¹The Manual for Complex Litigation provides different approaches to select class counsel.
 26 First, there is the "private ordering" approach where the attorneys agree who should be lead class
 27 counsel and the court approves the selection after a review. Manual for Complex Litigation § 21.272.
 28 Second, the "selection from competing counsel" where the court selects counsel, who are unable to
 agree, based on the examination of the factors in Rule 23(g)(1)(C). Id. Third, there is a "competitive
 bidding" process that is novel and experimental and have been used for antitrust and securities cases.
Id. As the parties do not agree who should be lead counsel, the Court uses the factors in Rule
 23(g)(1)(C) to make its determination.

certification, and negotiating settlement.” Manual of Complex Litigation § 21.11. If the parties do not stipulate to class counsel, the court will need to select and designate class counsel. Id.

A. Identifying or Investigating Potential Claims

Since August 2012, DSMW and PAS have worked cooperatively, efficiently dividing the research and work among counsel. They conducted pre-filing due diligence; public source investigation; and interviewed Plaintiff, other consumers and other witnesses. They also engaged a laboratory to perform independent testing of Defendant’s products as to caloric content.

Specifically, they have analyzed the resulting test data, held a conference call with defense counsel to share those results, and provided the lab results to defense counsel for evaluation. They obtained information about Defendant’s manufacturing process and testing methodology, and investigated the propriety of the caloric testing methodology employed by Defendant with lab personnel. They subpoenaed records from the laboratory that performed testing for the “Today Show,”² analyzed these results, and subpoenaed records from the “Today Show” for all notes, interviews, research, communications or documents related to the segment. In addition, they claim to be the first to file claims against Arctic Zero.³ Moreover, they served Defendant with a Consumer Legal Remedies Act Notice and right to cure on August 31, 2012 but Defendant took no corrective action. As a result of this notice, Michelle and the entire class will be entitled to CLRA damages upon amendment. They also interviewed putative class members from several states regarding their

²According to Plaintiffs Gertler, Freeman, Kaplan and Hiller, on August 20, 2012 a “Rossen Report” on NBC’s Today Show revealed that tests by EMSL, a food laboratory, determined the caloric content of Defendant desserts were as much as 68% more than stated on the product packaging.

³The parties dispute the relevance of first-to-file regarding the selection of interim class counsel. The Ninth Circuit has not made a ruling on this issue. It appears that first-to file can be a relevant factor when the factors for class counsel do not tilt heavily in either direction and there is a need for an objective tie-breaker. See Richey v. Ells, 12cv1831-WJM-MEH, 2013 WL 179234 (D. Colo. Jan. 17, 2013) (since all firms were more than qualified to handle the action, court appointed counsel who first filed the case) (citing Biondi v. Scrushy, 820 A.2d 1148, 1159 (Del. Ch. 2003); Moradi v. Adelson, 11cv490-GMN-RJJ, 2011 WL 5025155, *3 (D. Nev. Oct. 20, 2011); Cf. Nowak v. Ford Motor Co., 240 F.R.D. 355, 365 (E.D. Mich. 2006) (“first to file” by itself has little to do with who is best qualified to lead the case in case where the balance tipped in favor of a particular firm).

Statutorily, the Private Securities Litigation Reform Act (“PSLRA”) discourages the selection of lead counsel based on the “first to file” rule. See Yousefi v. Lockheed Martin Corp., 70 F. Supp. 2d 1061, 1071 (C.D. Cal. 1999); In re Century Business Servs. Secs. Litig., 202 F.R.D. 532, 536–37 (N.D. Ohio 2001); In this case, as discussed below, the balance tips in favor of DSMW and PAS. Therefore, first to file is not a relevant factor in determining interim class counsel.

1 experiences with the product.

2 B&F states it has conducted an extensive investigation of potential claims by collecting
3 information about Defendant's misrepresentation. It has reviewed documents and corresponded with
4 and interviewed class members; commissioned laboratory testing to confirm the calorie content of
5 Defendant's products; conducted a thorough search of publicly available resources with a focus on
6 caloric claims; corresponded and coordinated with counsel for other Plaintiffs and Defendant regarding
7 potential claims and related to consolidation and/or coordination of the related actions.

8 All Plaintiffs filed their complaints within two months of each other. Since the beginning of
9 these cases, DSMW and PAS have shown they have invested more time and resource than B&F into
10 prosecuting this action. Accordingly, this factor favors DSMW and PAS.

11 **B. Experience in Handling Class Actions, Other Complex Litigation, and the Types**
12 **of Claims Asserted in the Action**

13 This factor does not favor one firm over another as all the firms have extensive experience
14 handling class actions and complex litigation related to consumer protection.

15 **C. Knowledge of Applicable Law**

16 Similarly, since all firms are involved in complex litigation and class actions concerning
17 consumer protection, all the firms have extensive knowledge about the applicable law.

18 **D. Resources that Counsel will Commit to Representing the Class**

19 DSMW and PAS state they will devote significant human and financial resources to represent
20 the interests of the proposed class. Each firm has committed multiple lawyers to the case and has
21 maintained a staff of paralegals and support staff. B&F states it will staff the case with experienced
22 lawyers who have substantial expertise and work-product developed from other similar cases. It also
23 has the resources and personnel necessary to pursue this case. Both firms have personnel and financial
24 resources to represent the class.

25 Based on a review of the factors above, DSMW and PAS has demonstrated they have
26 conducted more research and investigation in developing the case. Accordingly, the Court concludes
27 that DSMW and PAS would fairly and adequately represent the interests of the class.

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1 **II. Executive Committee and Liaison Counsel**

2 Plaintiffs Gertler, Freeman, Kaplan and Hiller seek to appoint Scott+Scott as liaison counsel
3 and to appoint an Executive Committee comprising of three law firms: Faruqi & Faruqi; Stephan
4 Zouras and Lexington Law Group.

5 According to the Manual of Complex Litigation, executive committees

6 are most commonly needed when group members' interests and positions are
7 sufficiently dissimilar to justify giving them representation in decision making. The
8 court or lead counsel may task committees with preparing briefs or conducting
9 portions of the discovery program if one lawyer cannot do so adequately. Committees of counsel can sometimes lead to substantially increased costs, and they should try to avoid unnecessary duplication of efforts and control fees and expenses.

10 Manual for Complex Litig., § 10.221. In one case, a court agreed to appoint liaison counsel, in
11 addition to interim lead counsel, to represent the possibly diverging interests of a putative class which
12 has brought some separate, "non-overlapping" claims. Medlock v. Taco Bell Corp., CV-F-09-1314
13 OWW/DLB, 2009 WL 1444343, at *7 (E.D. Cal. May 19, 2009).

14 In support of their request, Plaintiffs assert that the proposed structure with one interim lead
15 counsel, one liaison counsel, and a three-firm executive committee "will efficiently serve the needs
16 of both the Class and the Court." Plaintiffs do not address whether the interests of the class diverge
17 or are dissimilar. The Court also notes that while these cases are class actions, the substantive legal
18 and factual issues are not complex. The Court concludes that Plaintiffs have failed to demonstrate that
19 the appointment of a three-firm Executive Committee or Liaison Counsel to prosecute this action is
20 warranted. See Manual for Complex Litigation § 10.221.

21 Second, there has been no showing that the interests of efficiency and economy are best served
22 by appointing a three-firm Executive Committee. Plaintiff has not demonstrated that a committee of
23 counsel is necessary to effectively and efficiently prosecute this action, while avoiding unnecessary
24 costs and duplication of efforts. See Manual for Complex Litig., § 10.221 (noting that "Committees
25 of counsel can sometimes lead to substantially increased costs"). Accordingly, Plaintiffs' request for
26 appointment of a Liaison Counsel and a three-firm Executive Committee is DENIED.

27 **III. Motion to Consolidate**

28 The parties do not dispute consolidation of all six cases because the actions are substantially

1 similar and raise identical questions of law and fact and consolidation will serve the interests of
 2 efficiency and judicial economy. See Fed. R. Civ. P. 42(a). Under Federal Rule of Civil Procedure
 3 42(a), this Court can consolidate cases that “involve a common question of law or fact.” Fed. R. Civ.
 4 P. 42(a). The Court concludes that all six cases raise similar questions of law and fact. Accordingly,
 5 the Court GRANTS Plaintiff Michelle’s motion to consolidate.

6 **Conclusion**

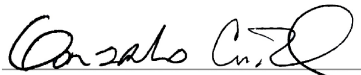
7 Based on the above, the Court GRANTS Plaintiff Michelle’s motion to appoint Duckor
 8 Spradling Metzger & Wynne, ALC and Paris Ackerman & Schmierer, LLP as interim co-lead class
 9 counsel. The Court also GRANTS Plaintiff Michelle’s motion to consolidate.

10 The cases of Altara Michelle v. Arctic Zero, Inc., No. 12-cv-2063-GPC-NLS (S.D. Cal. Filed
 11 August 21, 2012); Brenda Freeman v. Arctic Zero, Inc., No. 12-cv-2279-GPC-NLS (S.D. Cal. Filed
 12 September 18, 2012); Lori-Ann Gertler v. Arctic Zero, Inc., 12-cv-02284-GPC-NLS (S.D. Cal. Filed
 13 September 19, 2012); Judy Kaplan v. Arctic Zero, Inc., No. 12-cv-2544-GPC-NLS (S.D. Cal. Filed
 14 October 19, 2012); Susane Hiller v. Arctic Zero, Inc., No. 12-cv-2593-GPC-NLS (S.D. Cal. Filed
 15 October 24, 2012); and Kai v. Arctic Zero, Inc., No. 12-cv-2647-GPC (S.D. Cal. Filed October 31,
 16 2012) are hereby consolidated under the docket number 12-cv-2063-GPC-NLS (Altara Michelle
 17 matter). The Court DIRECTS the parties to make all future filings solely in Case No. 12cv2063-
 18 GPC(NLS) and bear the caption: “In re Arctic Zero, Inc.”

19 The Court further DENIES Plaintiffs’ cross motion to appoint Bursor & Fisher, P.A. as Interim
 20 Lead Class Counsel; Scott+Scott LLP as Liaison Counsel; and appoint an executive committee
 21 composed of Faruqi & Faruqi LLP, Stephan Zouras LLP and Lexington Law Group.

22 IT IS SO ORDERED.

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 24 DATED: March 1, 2013

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 26 HON. GONZALO P. CURIEL
 27 United States District Judge
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